

November 24, 2003

Jenner & Block, LLC
601 Thirteenth Street, NW
Suite 1200 South
Washington, DC 20005-3823
Tel 202 639-6000
www.jenner.com

Chicago
Dallas
Washington, DC

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Mark D Schneider
Tel 202 639-6005
Fax 202 639-6066
mschneider@jenner.com

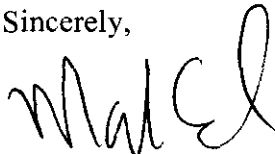
DEC 16 2003

Re: *In re Petition of Vonage Holdings Corporation for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Docket No. 03-211*

Dear Ms. Dortch:

On November 24, 2003, MCI and CompTel submitted their joint reply comments in the above-referenced proceeding via the Commission's online Electronic Comment Filing System. Enclosed please find a courtesy paper copy for your records.

Sincerely,



Mark D. Schneider

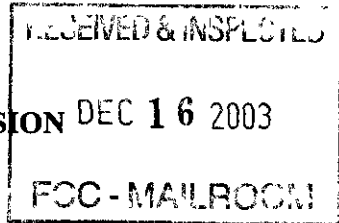
MDS:pb
Enclosure

cc: Matthew Brill
Robert Cannon
Michelle Carey
Jeff Carlisle
Kyle Dixon
Jordan Goldstein
Daniel Gonzalez
Christopher Libertelli
Bill Maher

Dr. Scott Marcus
Carol Matthey
Tom Navin
Brent Olsen
Dr. Robert Pepper
Jessica Rosenworcel
Bryan Tramont
Lisa Zaina

No. of Copies rec'd _____
List ABCDE

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554



In the Matter of

VONAGE HOLDINGS CORPORATION
Petition for Declaratory Ruling
Concerning an Order of the
Minnesota Public Utilities Commission

)
)
)
)
)
)

WC Docket No. 03-211

JOINT REPLY COMMENTS OF MCI & COMPTTEL

COMPTel/ASCENT ALLIANCE

WORLDCOM, INC d/b/a MCI

Jonathan Lee
Sr. Vice President, Regulatory Affairs
1900 M Street, N.W., Suite 800
Washington, D.C. 20036
(202) 296-6650

*Attorney for the
CompTel/ASCENT Alliance*

Richard S. Whitt
Henry Hultquist
Kecia B. Lewis
1133 19th Street, N.W.
Washington, D.C. 20036
(202) 887-3845

Mark D. Schneider
Ian T. Graham
JENNER & BLOCK, LLC
601 13th Street, N.W.
Washington, D.C. 20005
(202) 639-6005

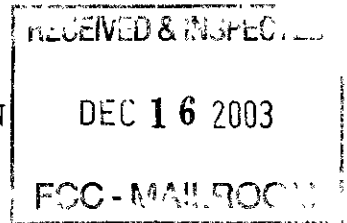
Attorneys for MCI

November 24, 2003

TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY.....	1
II.	IP-BASED APPLICATIONS LIKE VoIP ARE “INFORMATION SERVICES”	5
III.	IP-BASED APPLICATIONS LIKE VoIP ARE “INTERSTATE” SERVICES	9
IV.	LAW ENFORCEMENT CONCERNS ABOUT CALEA SHOULD BE ADDRESSED DIRECTLY, AND NOT BY MISCHARACTERIZING THE REGULATORY CLASSIFICATION OF VoIP	12
V.	E911 COMMENTS SUPPORT THE NEED FOR FURTHER FACT-FINDING	14
VI.	CONCLUSION	18

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554



In the Matter of

VONAGE HOLDINGS CORPORATION

Petition for Declaratory Ruling

Concerning an Order of the

Minnesota Public Utilities Commission

)
)
)
)
)
)

WC Docket No. 03-211

JOINT REPLY COMMENTS OF MCI & COMPTel

WorldCom, Inc. d/b/a MCI ("MCI") and the CompTel/ASCENT Alliance ("CompTel") hereby submit their joint reply comments to Vonage Holding Corporation's ("Vonage") *Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission* ("Petition") in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY

Based on the many initial comments submitted in this proceeding, there appears to be general agreement within the industry that – notwithstanding the permanent injunction issued by the Minnesota District Court regarding the specific dispute between Vonage and the Minnesota PUC¹ – there remains a compelling and immediate need for the Commission to consider the full regulatory implications of VoIP services. While some commenters believe that the Commission should dismiss the instant Petition,² they present no compelling reason to do so.

¹ *Vonage Holdings Corp. v. Minnesota Pub. Serv. Comm'n*, No. 03-5287, 2003 U.S. Dist. LEXIS 18451 (D. Minn. Oct. 16, 2003) (Davis, J.); see also *In re the Complaint of the Minnesota Department of Commerce Against Vonage Holding Corp. Regarding Lack of Authority to Operate in Minnesota*, Docket No. P-6214/C-03-108 (Minn. Pub Utils. Comm'n Sept. 11, 2003).

² See, e.g., Comments of Minnesota Dep't of Commerce (decision in Vonage proceeding not necessary because of permanent injunction, but Commission should launch broad rulemaking

Many industry commenters that address the matter join MCI and CompTel in urging the Commission to complete the current proceeding brought by Vonage, and to issue a declaratory ruling regarding the two narrow legal issues that are before it today.³ These issues can be resolved promptly on the basis of the record created here because they are legal in nature and do not depend on assessing a broader body of factual and economic material that the Commission will have before it in the contemplated VoIP rulemaking docket.

First, the Commission should find that Vonage's VoIP services are interstate "information services," as that term is defined in the Telecommunications Act of 1996 (the "Act").⁴ We agree with the many commenters who maintain that VoIP services are properly treated as interstate "information services" under the Act, as well as under applicable case law and the Commission's established regulations.⁵

Second, the Commission should declare that state regulations regarding VoIP services are pre-empted under applicable federal laws, because Congress and the Commission have previously determined that the Internet should remain unregulated, because any intrastate

proceeding to address "significant policy and regulatory issues" presented in the Petition). Indeed, the four monopoly Bell companies all recommend that the Commission launch a broad rulemaking proceeding to define a unified national policy for VoIP services, even though they do not agree on the outcome of this Petition.

³ See, e.g., Comments of Level 3 Communications; Comments of Time Warner Telecom, Inc.; Comments of Cisco Systems, Inc.; Comments of USA DataNet Corp.; Comments of Paetec Communications, Inc.

⁴ Pub. L. 104-104, 110 Stat. 56 (Feb. 8, 1996), codified at 47 U.S.C. § 151 *et seq.* An "information service" is defined as the offering of a capability "for generating, acquiring, storing, transforming, proceeding, retrieving, utilizing, or making available information via telecommunications . . ." 47 U.S.C. § 153(20).

⁵ See, e.g., Comments of SBC Communications, Inc. at 2 ("Commission should adopt a clear and broad federal framework designed to protect Internet-based services from common carrier-type regulation under the Communications Act.").

component of VoIP services is inseverable from the interstate component, and because such state regulations would interfere with the paramount need for a unified national policy regarding VoIP services.⁶ Such a declaratory ruling would embrace the core findings of the Minnesota District Court in the *Vonage* case, and halt the flood of conflicting activity by state commissions that started shortly after the Minnesota PUC issued its faulty decision in September. No further fact-finding or comment-gathering is needed to reach these two legal conclusions.⁷

Preemption is appropriate – indeed, mandated – in this context, and there is no reason for the Commission to delay resolution of this issue. It is impossible to have an unregulated national service, as Congress contemplated, while at the same time subjecting that service to regulation

⁶ See 47 U.S.C. § 230(b); 2003 U.S. Dist. LEXIS 18451 at *11 (Congress “has spoken with unmistakable clarity” against the regulation of the Internet and Internet-related services); *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (recognizing that “Congress acted to keep government regulation of the Internet to a minimum.”).

⁷ CenturyTel suggests that the Commission should disregard the recent decision of the Minnesota District Court in the *Vonage* case, on the grounds that it is not binding on the Commission. See Comments of CenturyTel at 3. It is CenturyTel’s comments that should be disregarded. Unless the Act is susceptible to multiple reasonable interpretations, the Commission is bound by judicial construction of the Act. See *Brand X Internet Services v. FCC*, No. 02-70518, 2003 U.S. App. LEXIS 20306, at *28 (9th Cir. Oct. 6, 2003) (a prior judicial statutory interpretation may be disregarded in favor of subsequent agency interpretation “only where the precedent constituted deferential review of” the agency’s decision-making under *Chevron*, and where the statute is susceptible of multiple reasonable interpretations) (citation omitted); *United States v. Mead Corp.*, 533 U.S. 218, 248-49 (2001) (Scalia, J., dissenting) (“I know of no case, in the entire history of the federal courts, in which we have allowed a judicial interpretation of a statute to be set aside by an agency – or have allowed a lower court to render an interpretation of a statute subject to correction by an agency.”). While the District Court’s decision may not directly bind other courts outside of Minnesota (or outside of the Eighth Circuit if the decision is affirmed on appeal), other courts reviewing a subsequent inconsistent ruling by the Commission would be required to give the Minnesota District Court’s decision due deference under the “comity” doctrine. See, e.g., *West Gulf Maritime Ass’n v. ILA Deep Sea Local 24*, 751 F.2d 721, 728 (5th Cir. 1985); *Toyota Motor Sales, USA, Inc. v. Farr*, 237 F. Supp. 2d 703 (S.D. Miss. 2002). Since Article III courts are the final arbiter of statutory interpretations, the Commission is not free to completely disregard the Minnesota District Court’s decision. It too must afford due deference to the *Vonage* decision in reaching a proper ruling in this proceeding.

by the states. To the extent that VoIP services include an intrastate component, it is inseparable and indistinguishable from the generally interstate nature of the service, particularly given the geographic indefiniteness of this IP-based application. Regardless as to how the Commission comes out on the various subsidiary policy questions (e.g., E911, universal service, CALEA), it is clear that a single national policy approach is appropriate here.

In reaching these conclusions, we join the many commenters who urge the Commission to re-affirm its historical “layers” approach set out in the *Computer Inquiry* rules, which differentiates between basic access technologies and enhanced application technologies.⁸ Under that approach, there is no need as a general matter to regulate applications at either the state or federal level, so long as the last-mile transmission paths over which they ride remain open to all users.

Nearly all of the commenters also agree that VoIP services implicate a host of other policy questions that should be fully addressed by the Commission, but are not squarely presented in this proceeding for a fully-informed decision. Such issues include the impact of VoIP services on law enforcement (CALEA) and national security activities, support for emergency service (basic and enhanced 911 (collectively, “E911”)) systems, universal service, and the inter-carrier compensation system.⁹ We agree that the Commission should address these

⁸ See, e.g., Comments of SBC Communications, Inc. at 6 (“The Commission’s approach to protecting the Internet and Internet-based services from federal and state regulation has been highly successful for many years.”), Comments of Level 3 Communications, LLC at 7-13 (reviewing history of Commission’s “basic” and “enhanced” regulatory dichotomy and subsequent embodiment in the Act).

⁹ We also urge the Commission to move forward expeditiously on the related proceedings regarding universal service and inter-carrier compensation reforms. See WorldCom Comments, *In re Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 (FCC filed Feb. 28, 2003); WorldCom Comments, *In re Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92 (FCC filed Aug. 21, 2001). Swift and

issues by launching appropriate fact-gathering activities at a national level that will eventually lead to a rulemaking proceeding. Until these national policy issues can be properly and rationally addressed in due course, the Commission should maintain the status quo position that VoIP services are interstate “information services” that cannot be regulated below the federal level.

II. IP-BASED APPLICATIONS LIKE VoIP ARE “INFORMATION SERVICES”

In our initial comments, we demonstrated that Vonage’s VoIP service, and other services like it, are properly classified as “information services.” We also concur with the comments of SBC and Level 3 Communications, which recommend that the Commission apply only a minimalist scope of regulations to VoIP services, and not subject them to the blanket application of the Title II regulatory model.¹⁰

Other industry players, however, oppose the Petition and claim that Vonage’s VoIP services should be treated as “telecommunications services” under the Act.¹¹ The primary (and faulty) rationale of these opponents is that because VoIP provides the “functional equivalent” of

constructive resolution of the issues raised in those dockets may largely negate the subsidiary concerns raised here about VoIP services.

¹⁰ See Comments of SBC Communications, Inc. at 6-7 (“The large and growing list of state proceedings in this area, and the various proceedings pending before the Commission, require it to take affirmative action to implement Congress’s declared policy against regulation of the Internet”); Comments of Level 3 Communications, LLC at 3 (“If the FCC determines through this rulemaking that regulation is necessary to achieve specific public policy goals, Level 3 urges the Commission to apply only those regulations necessary to meet the specific goal rather than blanket VoIP services with inappropriate Title II regulation.”).

¹¹ See, e.g., Comments of Minnesota Dep’t of Commerce at 11-24; Comments of Sprint at 4-7; Comments of CenturyTel at 3-13.

telephone service, and because Vonage advertises it as such, therefore Vonage's service is a "telecommunications service" under the Act. MCI and CompTel strongly disagree.

The "functional equivalent" test advocated by these opponents is not consistent with the Act, and in any event is not factually accurate. Rather, the definition of "information services" is whether the service offers a capability "for generating, acquiring, storing, transforming, proceeding, retrieving, utilizing, or making available information via telecommunications."¹² Nothing in that definition turns on whether the new service provides some of the same functions as a basic telecommunications service. If VoIP services are Internet-based computer applications that can act upon or access information via telecommunications, then they are enhanced "information services" under the Act. While the initial version of most VoIP offerings designed today may mimic traditional telephone services, such as plugging a "black phone" handset into a mini-computer device to provide a familiar interface to end users, that does not, by itself, convert these services to "telecommunications services" under the Act.

Since Internet-based applications are distinct from the basic transmission services over which they ride, they are capable of providing features and functionalities that go well beyond basic transmission services. There are already many examples of the kinds of novel capabilities that are enabled by VoIP technology, including features that allow callers to connect into non-traditional PC-client and SIP phones, or to route calls outside of the NANP system. And because VoIP services are based at the applications layer, the future enhancements for such services, and interfaces with other IP-based services, are limitless. Declaring VoIP services to be "telecommunications services" simply because they use the PSTN in some instances today ignores their truly "enhanced" nature, and threatens to impose a regulatory straightjacket that

¹² 47 U.S.C. § 153(20)

might well deter the development and deployment of such services. Congress specifically intended that the Internet be left unregulated so that nascent applications like VoIP would not be stillborn due to the inappropriate application of regulations designed for legacy technologies.

Furthermore, many commenters misapply the Commission's tentative 4-factor test for phone-to-phone IP telephony, contained in the *1998 Report to Congress*. The Commission's factors include whether the service (1) holds itself out as providing voice telephony; (2) does not require the use of different customer premise equipment ("CPE") from that necessary to place an ordinary touch-tone call over the PSTN; (3) allows the end user to call phone numbers assigned in accordance with the North American Numbering Plan ("NANP"), and (4) transmits customer information "without net change in form or content."¹³

Although some commenters suggest otherwise,¹⁴ there is no technical basis for claiming that VoIP services do not require different CPE to operate. The MTA unit to which end users plug in their legacy black phones is a digital modem mini-computing device that converts the user's voice signal into packets. This process provides a more familiar interface to users while allowing the call to be transformed from one protocol (analog voice) to another (digital packets), and is similar to how dial-up Internet calls work today. The only key difference is that the signal is transformed at the customer's premise before transiting the local loop, rather than inside a modem bank located at an ISP's facilities on the other side of the local loop.

¹³ *In re Federal-State Joint Board on Universal Service*, 13 F.C.C.R. 11501, ¶ 88 (1998) ("*1998 Report to Congress*"). As we have noted in other contexts, we remain uncertain whether the Commission's 4-factor test properly applies the definitional standards articulated in the Act for "information services," which is much broader than applied by the Commission in its *1998 Report to Congress*. However, given that Vonage's VoIP services clearly satisfy the test, it is not necessary to revisit the 4-factor test in this proceeding.

¹⁴ *See, e.g.*, Comments of Independent Telephone & Telecommunications Alliance at 8-10.

There also is considerable discussion in the comments about the “net protocol conversion” prong of the Commission’s test. Some commenters rightly suggest that this standard is of limited utility,¹⁵ and we note that it is only one of several alternative criteria the Commission has used to identify information services. Indeed, the limits of the “net protocol conversion” test as a sign of a true “information service” is evident here: in the case of computer-to-computer IP telephony, such as between two Vonage subscribers that never touches the PSTN, the entire conversation is conducted via IP communications and there is no net protocol conversion. Whereas in the computer-to-phone variant, the VoIP gateway on the far end of the communication converts the IP communication back to traditional TDM voice signals for completion on the PSTN, resulting in net protocol conversion. Yet it makes no sense to consider the first service a “telecommunications service,” while the latter an “information service.” Thus, although protocol conversion is one kind of enhanced service that can be distinguished from transmission over which the protocol rides, the absence of net protocol conversion obviously is not proof that a service is a telecommunications service.¹⁶

Finally, to the extent that various opponents to the Petition point to Vonage’s marketing activities, claiming that Vonage is selling the VoIP services as a replacement for traditional telephony in a misleading manner, this is not sufficient grounds for declaring VoIP services generally to be “telecommunications services.” Rather, if the Commission is concerned that end

¹⁵ See, e.g., Comments of SureWest Communications at 6 (arguing that net protocol conversion test is “outdated”). While we agree that the 4-factor test may be outdated, we do not agree with the outcome of SureWest’s position, which wrongly suggests that VoIP services are “telecommunications services.”

¹⁶ Indeed, the Commission’s regulatory definition for “enhanced services” is not limited to protocol conversion. 47 C.F.R. § 64.702(a) more broadly includes “applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information.”

users might be misled by one provider's marketing activities, such that they do not understand what they are buying and how it operates, then the proper response is to implement focused requirements on the nature and scope of such marketing activities. The Commission should not broadly misapply the Act to an entire class of technology in order to address one company's marketing practices.

III. IP-BASED APPLICATIONS LIKE VoIP ARE "INTERSTATE" SERVICES

We agree with the majority of industry commenters that VoIP services are properly designated as "interstate" under the Commission's jurisdictional scheme.¹⁷ Even some of the commenters asserting that VoIP services are "telecommunications services," such as Verizon, concur that such services are interstate in nature.¹⁸

While other carriers maintain that VoIP services should be regulated as "telecommunications services" under the improper "functional equivalency" standard, they fail to acknowledge that the services are in any event interstate in nature, and so should not be subject to state jurisdiction even if they were "telecommunications services."¹⁹ It is simply not the case that state regulations over "telephone service" includes *interstate* "telecommunications services."²⁰ To the contrary, as pointed out by SBC, the states' regulatory jurisdiction under

¹⁷ See, e.g., Comments of SBC Communications, Inc. at 2 (Commission has jurisdiction over interstate services).

¹⁸ See Comments of Verizon at 15 ("services like Vonage's are jurisdictionally interstate, even though they may be used to complete calls that originate and terminate in the same state").

¹⁹ See Comments of Sprint Corp. at 4-7; Comments of CenturyTel, Inc. at 2-8.

²⁰ See Comments of CenturyTel, Inc. at 14-15.

Title II of the Act does not extend to interstate services.²¹ If Vonage's VoIP services lack a distinct and severable intrastate component, then there is no opening for the states' proposed regulatory activities over VoIP, regardless of whether or not they constitute "telecommunications services."

Vonage has presented a cogent case in its Petition that any intrastate components of its VoIP services, as an IP-based application, are inextricably intertwined with and indistinguishable from the interstate components. Other commenters agree with Vonage's position.²² Because end users subscribing to Vonage's services can connect to the Internet from any location around the world, there currently is no technologically reliable way to determine the end user's geographic situs for determining call jurisdiction. Opponents to the Petition have not substantively rebutted this point.²³

Additionally, many commenters agree with MCI and CompTel that preemption is appropriate under the standards set out in *Louisiana Public Service Commission v. FCC*. There, the Court identified a variety of conditions under which the federal pre-emption of state laws is permissible pursuant to the Supremacy Clause of the Constitution.²⁴ At least three of those

²¹ See Comments of SBC Communications, Inc. at 2 (citing 47 U.S.C. § 152(a)).

²² See Comments of the High Tech Broadband Coalition at 10 (application of "mixed use" rule to DSL services); Comments of Motorola, Inc. at 14 (Commission authorized to pre-empt inconsistent state regulations where it is not possible to separate the interstate and intrastate components of the service); see also *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986).

²³ In their comments, the various state organizations do not reject Vonage's technical claims. Rather, they merely assert that these claims need to be evaluated in more detail. See, e.g., Comments of Minnesota Dep't of Commerce at 22-23. Obviously, this suggests that (in the best possible light) the Minnesota PUC failed to conduct sufficient fact-finding in the first instance.

²⁴ 476 U.S. at 368-69.

conditions are applicable here: (1) Congress has enacted a federal statute that expresses its unambiguous intent that the Internet shall remain unregulated; (2) comprehensive congressional legislation regarding the status of “information services” occupies the entire field of regulation over IP-based applications; and (3) state regulation over VoIP services would be inconsistent with, and contain an implicit barrier to, a unified national policy regarding these services. Moreover, the Supreme Court has explained that “a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.”²⁵

Sprint maintains that the Minnesota District Court misapplied the pre-emption doctrine to the Vonage situation.²⁶ It points to the *California II* and *III* decisions from the early 1990s²⁷ as support for the proposition that the Commission cannot pre-empt state action over the tariffing of intrastate enhanced services. But Sprint forgets that both of those statutory interpretation cases predated the Act, which was enacted in 1996, and Congress’ subsequent revisions to the Act with respect to the Internet. While Congress might not have spoken with sufficient clarity in 1990 (*California II*) to satisfy the *Louisiana PSC* preemption standards, the statutory framework that the Commission is charged with implementing is dramatically different today. Indeed, Congress has plainly addressed this issue.²⁸ Pre-emption is appropriate here under the factual circumstances, and the Commission unquestionably has the legal authority to do so.

²⁵ *Id.* at 369.

²⁶ See Comments of Sprint Communications at 12-15.

²⁷ See *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (“*California II*”); *California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (“*California III*”).

²⁸ See 47 U.S.C. § 230(b); 2003 U.S. Dist. LEXIS 18451 at *11 (Congress “has spoken with unmistakable clarity” against the regulation of the Internet and Internet-related services); *Zeran v. America Online, Inc.*, 129 F.3d at 330 (recognizing that “Congress acted to keep government regulation of the Internet to a minimum.”).

**IV. LAW ENFORCEMENT CONCERNS ABOUT CALEA SHOULD BE
ADDRESSED DIRECTLY, AND NOT BY MISCHARACTERIZING
THE REGULATORY CLASSIFICATION OF VoIP**

The Federal Bureau of Investigation ("FBI") and the Department of Justice ("DOJ") devote a considerable portion of their joint comments to the potential impact of VoIP services on the Communications Assistance for Law Enforcement Act ("CALEA").²⁹ We are highly sensitive to the underlying concerns of law enforcement and national security organizations about their continued ability to lawfully intercept communications, and renew our past pledges to work cooperatively with respect to such issues. But the FBI/DOJ suggestion that the Commission's decision on the appropriate regulatory classification of VoIP services should turn entirely on bringing them within the scope of CALEA should be rejected.

The FBI/DOJ comments recommend that VoIP services be treated as "telecommunications services." But unlike other opponents of the Petition, their rationale boils down to the notion that if VoIP services are treated as "information services," then the Commission would have "clearly undercut CALEA's very purpose, and jeopardize the ability of federal, state, and local governments to protect public safety and national security."³⁰ They contend that the Commission should not classify VoIP services in any manner that would potentially remove them from CALEA's jurisdiction. This argument is misguided for several reasons.

Initially, the FBI and DOJ appear to misread the provisions of CALEA. This statute contains its own definition for "information services" that is not identical to the definition

²⁹ Pub. L. No. 103-414, 108 Stat. 4279 (Oct. 25, 1994).

³⁰ Joint Comments of FBI and DOJ at iv.

contained in the Act.³¹ In addition to exempting services that offer “a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications,” which is the same standard under the Act, CALEA also specifically exempts “electronic messaging services.”³² This term is defined as “software-based services that enable the sharing of data, images, sound, writing, or other information among computing devices controlled by the senders or recipients of the messages.”³³ VoIP services are software-based and enable the sharing of sound between computing devices (i.e., PCs, MTAs, and gateways) that are controlled by end users. Thus, even if VoIP might be classified as a “telecommunications service” under the Act (an outcome with which we strongly disagree), that still would not decide the definitional question under CALEA.

Moreover, under the *Computer Inquiry* rules, a regulated access component (basic telecommunications service) always underlies the VoIP services that transit the end user’s local loop.³⁴ Thus, in every instance where someone is using VoIP service, law enforcement should

³¹ See generally *U.S. Telecom Ass’n v. FCC*, 227 F.3d 450, 455 (D.C. Cir. 2000) (“CALEA does not cover ‘information services’ such as e-mail and internet access.”)

³² 47 U.S.C. § 1001(6).

³³ *Id.* § 1001(4)

³⁴ The recent *Brand X* decision by the Ninth Circuit makes this point clearly. *Brand X*, 2003 U.S. App. LEXIS 20306, at *22-*25, *33 (reiterating that cable modem service is part “telecommunications service” and part “information service”). To the extent that the FBI and DOJ’s concerns are well-placed, they are with the Commission’s faulty logic in other proceedings in which it has been suggested that cable and DSL broadband services are pure “information services” that do not have an underlying “telecommunications service” component. See *In re Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 F.C.C.R. 4798 (2002) (“*Cable Modem Order*”); *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 F.C.C.R. 3019 (2002) (“*Broadband Framework*”). The Commission’s misguided approach in those two proceedings ignores the network “layers” paradigm that properly reflects how broadband technologies actually operate.

be able to get access to the underlying “telecommunications service” component. This provides law enforcement with the opportunity to access VoIP communications in the same manner that it can intercept other IP-based applications that transit basic access connections today. Law enforcement’s concerns about VoIP services may be based simply on a misunderstanding of their remaining jurisdiction over these transmission lines. The real threat to law enforcement’s access under CALEA is not in the application of the *Computer Inquiry* rules to VoIP services, but in the FCC’s proposal to abandon those rules altogether in the *Broadband Framework* proceeding. So long as basic transmission services remain regulated, law enforcement should retain all of the authority it needs under CALEA.

In any event, law enforcement should pursue a cooperative approach with industry before seeking to expand its jurisdiction under CALEA. Whether or not that statute directly applies to VoIP services, there are many opportunities for industry and law enforcement to establish proper procedures and methods to respond to lawful intercept requests. Trying to shoehorn VoIP into the wrong statutory category in order to solve a subsidiary concern, which may be addressable in a more direct fashion, would be poor public policy.³⁵

V. E911 COMMENTS SUPPORT THE NEED FOR FURTHER FACT-FINDING

Many commenters within industry and the government raise valid concerns about the relationship between VoIP services and E911 systems. For example, the Metropolitan 911

³⁵ The proposed approach to statutory construction in the FBI/DOJ comments also is faulty. The primary determination under the Act is how VoIP services fall within the applicable definitions of the Act, given Congress’ expressed intent, past Commission decisions, and applicable judicial precedent. *See, e.g., Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (“As in all statutory construction cases, we begin with the language of the statute.”). Whether VoIP services fall inside or outside the scope of CALEA is not a proper consideration for the Commission’s determination

Board of Minnesota is concerned that 911 calls could be mis-routed to unattended administrative phone numbers.³⁶ And the Association of Public-Safety Communications Officials rightly notes that while VoIP services may be 5-10 years away from becoming a major vehicle for communications in America, E911 planning is needed to meet that long-term growth profile.³⁷

But as these comments suggest, the appropriate treatment of VoIP services in the E911 context is a national issue that needs a national resolution. The worst possible approach would be for the 50 states each on their own to force VoIP into existing E911 rules that were designed for legacy technologies.

Instead, we agree with the majority of industry commenters who argue that these concerns should be properly addressed by the Commission through a broader fact-gathering inquiry and rulemaking proceeding, rather than as part of the instant proceeding. It is noteworthy that, notwithstanding the volume of initial comments submitted in response to the Petition, there is no assertion that the VoIP industry is unwilling or unable to cooperate with the reasonable requests of emergency service organizations, consistent with the technological capabilities of IP-based applications that lack geographic definiteness. While some of those capabilities (such as not knowing the physical location of the end user's PC or MTA device, since they can connect to the Internet over any IP connection) may be viewed as limiting by E911 organizations, other capabilities may offer future enhancements to current E911 practices (such as the ability of 911 operators to "push" a map to the end user's SIP phone screen to show the real-time status of emergency responders or diagrams on emergency procedures.) Only

³⁶ See Comments of Metropolitan 911 Board at 3.

³⁷ See Comments of the Association of Public-Safety Communications Officials-International, Inc. at 2 (attaching resolution regarding VoIP and E911 issues).

through a dialogue between industry and emergency service organizations will it become clear whether regulation is necessary in this area, and, if so, the form and structure that such rules should take.³⁸

The rush to issue E911 rules governing VoIP services without first developing a record as to how best to accomplish that task, as advocated by a few commenters, would be a mistake. VoIP communication is a nascent industry. Vonage, one of the leading VoIP service providers, has roughly 50,000 national customers to date. Presumably, many or most of those customers have other means (wireline or wireless) to access lifeline services. By way of contrast, New York alone has over 12 million PSTN connections.³⁹ While the VoIP user community undoubtedly will grow over time, not a single commenter in this proceeding has demonstrated that E911 access for VoIP customers is an urgent and compelling issue today. Indeed, there are serious technical considerations that flow from the existing E911 network infrastructure's inability to interoperate with IP-based services, such as support for location identification and emergency call routing, that counsel for a measured approach. The Commission should conduct a thorough fact-finding inquiry and support industry-government cooperatives. Only after conducting a complete investigation into these and other VoIP policy issues should the Commission seek to fashion new rules in this area.

³⁸ Indeed, the proper scope of such rules is questionable, given the Commission's limited ancillary jurisdiction over "information services" and Congress' expressed desire that the Internet remain unregulated at both the state and federal levels.

³⁹ See Initial Comments of Eliot Spitzer, Attorney General of the State of New York, filed in *In re Complaint of Frontier Telephone of Rochester, Inc. Against Vonage Holding Corp. Concerning Provision of Local Exchange and Inter-Exchange Telephone Service in New York State in Violation of the Public Service Law*, Docket No. 03-C-1285, at 13 n.41 (N.Y. Pub. Serv. Comm'n Oct 31, 2003).

We also note that the Commission recently proposed updated E911 guidelines for telecommunications service providers.⁴⁰ In the E911 Order, the Commission laid out four questions that it will use to determine the proper E911 treatment of telecommunications services: (i) does the service offer real-time, two-way voice service that is interconnected to the PSTN?; (ii) do the customers have a reasonable expectation of access to basic 911 and E911 services?; (iii) does the service compete with traditional mobile wireless or local wireless telephone services?; and (iv) is it technically and operationally feasible for the service to support E911 capabilities?

While these rules are not directly applicable to “information services,” the key will be to not blindly force-fit new technologies into rules and systems designed for old technologies. Indeed, the Commission acknowledged in the E911 Order that not every communications service should be or can be integrated with existing E911 systems. For example, the Commission currently exempts satellite systems (which are undergoing a technical capabilities review) and standard telematics services (which use a centralized call center system for handling emergency calls) from the scope of the E911 Order. Those commenters who argue for functionalist, technology-neutral regulations propose a change in current practices without offering sufficient justification for that change.

In sum, the Commission should fully explore the features and functions of VoIP and how they can and cannot interface with E911 systems. Through cooperation with industry, there is every reason to expect that an “enhanced” emergency service system can be devised, one that

⁴⁰ FCC News Release, *FCC Expands E911 Rules*, Nov. 13, 2003 – adopting Order and Second Further Notice of Proposed Rulemaking regarding E911 Rules for Telecommunications Services, CC Docket No. 94-102, IB Docket No. 99-67 (“E911 Order”).

addresses the valid concerns raised by the emergency service organizations while properly reflecting the capabilities and the current technical limitations of VoIP services.

VI. CONCLUSION

For the reasons stated herein, MCI and CompTel recommend that the Commission grant Vonage's Petition, specifically finding that (a) Vonage's VoIP service is an "information service" within the meaning of the Act, as recently interpreted by the Minnesota District Court; and (b) any state laws seeking to regulate Vonage's VoIP service are pre-empted as a matter of federal law. Furthermore, the Commission should continue with its plans to open a dialogue between industry and government to determine how best to achieve an appropriate set of consumer and national infrastructure protections as the usage of VoIP services expands in the future.

Respectfully submitted,

COMPTEL/ASCENT ALLIANCE

/s/ Jonathan Lee

Jonathan Lee
Sr. Vice President, Regulatory Affairs
1900 M Street, N.W., Suite 800
Washington, D.C. 20036
(202) 296-6650

*Attorney for the
CompTel/ASCENT Alliance*

WORLDCOM, INC. d/b/a MCI

/s/ Richard S. Whitt

Richard S. Whitt
Henry Hultquist
Kecia B. Lewis
1133 19th Street, N.W.
Washington, D.C. 20036
(202) 887-3845

Mark D. Schneider
Ian T. Graham
JENNER & BLOCK, LLC
601 13th Street, N.W.
Washington, D.C. 20005
(202) 639-6005

Attorneys for MCI

November 24, 2003